Office - Supreme Court,
FILED
MAY 1 1956
HAROLD B. WILLEY, CL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

No. 916

DAIRY PRODUCTS COMPANY OF UNIONTOWN,
Petitioner,

vs.

CLARK J. SLEETH, HEALTH OFFICER OF MONONGALIA COUNTY, WEST VIRGINIA,
Respondent.

GLENN HUNTER
12 Titus Building
Morgantown, West Vigrinia

CHARLES McCAMIC
National Bank of W. Va. Bldg.
Wheeling, West Virginia

Attorneys for Petitioner

The Press of Lawyers Printing Co., Inc., Richmond 7, Va.

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ORDINANCES AND REGULATIONS INVOLVED	6
STATEMENT	7
REASONS FOR GRANTING THE WRIT	18
CONCLUSION	27
APPENDIX I, Opinion of the Court of Appeals	29
APPENDIX II, Judgment of the Court of Appeals	37
APPENDIX III, Constitutional Provisions, Rules, Statutes and Regulations	39

Citations

Cases:

Baldwin v. Seelig, Inc., (1935) 294 U. S. 511	24, 25
Cleo Syrup Corp. v. Coca Cola Co., (1943) 139 Fed. 2d 416	26
Cummings v. Merchants National Bank of Toledo, 101 U. S. 903	23
Dean Milk Co. v. Madison, (1951) 340 U. S. 349	22, 24, 25

Page

Graver Tank & Mfg. Co. v. Linde Air Products Co., (1950) 339 U. S. 605 26

H. P. Hood & Sons, Inc. v. Dumond, (1949) 336 U. S. 525 25

Minor v. City of Keokuk, (1950) 92 Fed. Sup. 833 23

Nee v. Linwood Securities Co., (1949) 174 Fed. 2d 434 26

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 23

U. S. v. Yellow Cab Co., (1949) 338 U. S. 338 25

Constitutional Provisions, Statutes and Regulations:

Act No. 210, Commonwealth of Pennsylvania 6, 16

City of Pittsburgh Health Department Regulations 6, 16, 17

Constitution of the United States, Art. 1, Sec. 8, Cl.3 Commerce 6

Federal Rule 52(a) Findings by the Court 6

Milk Ordinance and Code, USPHS 1953 ..... 6, 9, 15, 19, 24

Pennsylvania Advisory Health Board Regulations 6, 15, 18

Title 28, U.S.C. 1254(1) Jurisdiction 3, 6

West Virginia Code, Chap. 16, Art. 7, Sec. 5 ..... 6, 15

West Virginia Milk Regulations--1944 ..... 4, 6, 9, 15, 18, 22

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

No. .....

DAIRY PRODUCTS COMPANY OF UNIONTOWN,
Petitioner,

vs.

CLARK J. SLEETH, HEALTH OFFICER OF MONONGALIA COUNTY, WEST VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on December 27,

1955, reversing the judgment of the District Court of the United States for the Northern District of West Virginia, entered on January 3, 1955.

OPINIONS BELOW

The opinions of the District Court for the Northern District of West Virginia and of the Court of Appeals for the Fourth Circuit have not been reported. The opinion of the District Court, dated December 13, 1954, appears in Appendix K, page 109, Court of Appeals. The opinion of the Court of Appeals, dated December 27, 1955, is appended hereto as Appendix I, page 29.

JURISDICTION

The judgment of the District Court was made and entered on January 3, 1955, and appears in Appendix L, page 125, Court of Appeals.

Upon motion of the defendant for rehearing, an order was made by the District Court on January 5, 1955 suspending the judgment of the court pending rehearing on the motion. Rehearing was had on April 18, 1955, on which date the court overruled the defendant's motion, reinstated the court's judgment of January 3, 1955, and directed defendant within ten days from the entry of the order to issue a permit to plaintiff to sell milk and milk products in Monongalia County, West Virginia. Motion by defendant for rehearing appears in Appendix M, page 128, Court of Appeals. The order of April 18, 1955, appears in Appendix P, page 263, Court of Appeals.

Upon appeal by defendant the Court of Appeals reversed, December 27, 1955. Petitioner then filed a petition for a re-

hearing in the Court of Appeals on January 25, 1956. Order staying the mandate pending action of the court was entered on January 30, 1956; and by an order on February 7, 1956, the court denied rehearing asked for and directed that mandate issue after the expiration of five days. Copy of the judgment is appended hereto as Appendix II.

The District Court had jurisdiction,

(1) On the ground of diverse citizenship;

(2) A federal question, involved the right of the plaintiff to engage in interstate commerce under the federal constitution.

The jurisdiction of this court is invoked under Title 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petitioner has a milk processing plant in Uniontown, Fayette County, Pennsylvania. It purchases its raw milk from some two hundred fifty to three hundred dairy farms located in Fayette, Somerset and Washington Counties, Pennsylvania, and Garrett County, Maryland. Having a surplus of pasteurized milk to market, it made application to Roger A. Kennedy, then Health Officer of Monongalia County, West Virginia, for a permit to sell pasteurized milk in said county. The permit was refused. Petitioner then brought suit in the United States District Court for the Northern District of West Virginia, asking the aid of the court in getting a permit.

The State of West Virginia had adopted the Milk Ordi-

nance and Code recommended by the United States Public Health Service. The Commonwealth of Pennsylvania has not adopted this code, but has its own basic law and milk regulations promulgated by its Advisory Health Board pertaining to the production, processing and sale of milk. Under Pennsylvania procedure dairy farms are inspected by licensed dairy farm inspectors, qualified to do this work under the law and regulations of the commonwealth. These inspectors are paid by industry—in this instance, Dairy Products Company of Uniontown.

Section 11 of the West Virginia Milk Regulations provides that milk from beyond the limits of routine inspection by the State of West Virginia may not be sold in the state unless produced or pasteurized under provisions equivalent to the requirements of the regulations, provided that the health officer shall satisfy himself that the health officer having jurisdiction over the producing and processing is properly enforcing such regulations.

The Health Officer of Monongalia County took the position that Pennsylvania regulations and procedures were not equivalent to those of West Virginia, and refused to recognize the system of dairy farm inspection followed by Pennsylvania and the City of Pittsburgh, which has been treated as the enforcing agency in this case, for the reason that Dairy Products Company sells milk in Pittsburgh, and has a permit to do so from both Pennsylvania and Pittsburgh.

The effect of the position taken by the Health Officer of Monongalia County is to exclude absolutely the milk of Dairy Products Company from the State of West Virginia, unless and until such time as the Commonwealth of Penn-

sylvania shall change its system of dairy farm inspection, making it identical to the method followed by the Health Officer of Monongalia County in the inspection of dairy farms in said county.

The District Court held that Pennsylvania and Pittsburgh regulations and procedures were equivalent to those of West Virginia, and that Dairy Products Company was entitled to a permit to sell milk in Monongalia County. This finding was based on testimony taken before the court. Upon appeal to the United States Court of Appeals, Fourth Circuit, by defendant, the Court of Appeals reversed, thus sustaining the position of the Health Officer of Monongalia County.

There is no question here of the quality of the milk of Dairy Products Company. The defendant Kennedy testified it was of good quality. App. I, p. 80, Court of Appeals.

Therefore, the principal question presented is, whether the Health Officer of Monongalia County, by refusing a permit to Dairy Products Company, may exclude its milk, which is admittedly of good quality, absolutely from West Virginia, and thereby deprive it of its right to engage in interstate commerce under the federal constitution. The District Court said that he could not. The Court of Appeals reversed.

A subsidiary question is, whether the Court of Appeals should not have adhered to the findings of fact of the District Court. It disregarded the District Court's findings without holding them clearly wrong.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, ORDINANCES AND REGULATIONS INVOLVED

(1) Constitution of the United States, Article I, Section 8, Clause 3, Commerce.

(2) Title 28 U.S.C. 1254(1), Jurisdiction.

(3) Federal Rule 52(a), Finding of Facts.

(4) Code of West Virginia, Chapter 16, Article 7, Section 5.

(5) The pertinent portions of West Virginia Milk Regulations of January 3, 1944, adopted under above code provisions, and revision thereof of September 16, 1954.

(6) An act of the General Assembly of the Commonwealth of Pennsylvania designated as No. 210, To Safeguard Human Health and Life, etc., approved by the Governor July 2, 1935, and the Advisory Health Board regulations pertaining to milk and milk products adopted April 2, 1940.

(7) Regulations adopted by City of Pittsburgh Health Department under Ordinance No. 500. App. O, pp. 188, 189, 190, 191, Court of Appeals.

(8) Pertinent parts of Milk Ordinance and Code recommended by United States Public Health Service, 1953 Edition.

The above are appended hereto as Appendix III, pp. 39-72.

STATEMENT

Original complaint filed September 12, 1951, *Dairy Products Company of Uniontown* vs. *Roger A. Kennedy, Health Officer of Monongalia County, West Virginia.* Defendant answered and moved to dismiss; motion overruled March 26, 1952 by Judge Wilson Warlick, judge by designation. Case set for hearing September 30, 1952 before Judge Robert N. Wilkin, judge by designation. By agreement of the parties and by order of the court, Darold W. Taylor of the United States Public Health Service was designated to make an inspection of the dairy farms tributary to the processing and receiving plants of the plaintiff, as may be required under West Virginia Milk Regulations adopted January 3, 1944, as a prerequisite for permit to plaintiff by defendant to sell milk in Monongalia County. Taylor made the inspection and filed his report in the Clerk's office January, 1953, to which report plaintiff filed objections.

At a further hearing held before Judge Wilkin November 6, 1953, upon motion, leave was granted to plaintiff to file an amended complaint, and order entered. It was stipulated and agreed by counsel for said parties, and so ordered by the court, that plaintiff would submit to defendant a new application for permit to sell milk in Monongalia County, and upon the filing thereof Darold W. Taylor would again make an inspection of the dairy farms tributary to plaintiff's pasteurization and receiving plants, and laboratory facilities and procedures, and such other inspection as may be required by West Virginia Milk Regulations adopted January 3, 1944, or which may be in effect at the time of said inspection, as a prerequisite to the issuance to plaintiff by defendant of a permit to sell milk in Monongalia

County, and that thereupon defendant would rule upon said application, and specify in detail in writing the reasons for his refusal to grant a permit, if refused.

The order also provided that if trial is necessary, the evidence will be restricted to issues raised by the amendments to complaint and the report of the inspector as to conditions subsequent to the present date (November 6, 1953). App. B, p. 11, Court of Appeals.

Amended, as well as original, complaint showed jurisdiction on grounds of diverse citizenship and right of plaintiff under federal constitution to engage in interstate commerce. Amended complaint appears as Appendix C, p. 13 et seq., Court of Appeals.

Plaintiff is a corporation under the laws of Pennsylvania, with its principal place of business in Uniontown, Fayette County, Pennsylvania. Defendant is Health Officer of Monongalia County, West Virginia, with his place of business and residence in the City of Morgantown, Monongalia County, West Virginia. He is a county, not a state officer.

Amended complaint alleges that refusal of defendant to grant a permit to plaintiff to sell milk in Monongalia County is a denial of its right to engage in interstate commerce, and causes a loss to plaintiff of many thousands of dollars per year, exceeding three thousand dollars; that the first report of Darold W. Taylor in January, 1953, was not based upon any adverse findings in the quality of the milk of plaintiff, but upon his inability to find documentary evidence supporting certain requirements; that said evidence is now available; that defendant made or caused arrests of plaintiff's employees engaged in carrying on a lawful business,

and threatened to continue to do so; that a permit was denied plaintiff to protect local milk processors and dealers in Monongalia County from competition, and for the purpose of giving them a monopoly of the milk business in said county; that there is produced within the State of West Virginia only sixty percent of its requirements in milk and milk products; that all the milk processed and distributed by plaintiff in the States of Pennsylvania and Maryland is produced, handled, pasteurized and inspected under and pursuant to the law of Pennsylvania relating to such matters, and designated an Act To Safeguard Human Health and Life By Providing for the Issuance of Permits to and Regulation of Persons and Entities Selling Milk and Milk Products, Conferring Powers and Imposing Duties Upon the Secretary of Health, The Advisory Health Board, and Otherwise Providing for the Administration of the Act and Imposing Penalties; that the methods of processing, handling and distributing said milk go beyond the requirements of the law and regulations of Pennsylvania, and are equivalent to the requirements of West Virginia Regulations, in conformity with Section 11 thereof, as well as with the Model Milk Ordinance and Code recommended by United States Public Health Service, to which West Virginia Regulations conform almost word for word. The prayer of the complaint is for the aid of the court in procuring the permit requisite to carrying on its business in said county. App. C, pp. 14, 18, 25, 26, 27, 28 and 29, Court of Appeals.

Defendant's answer to amended complaint appears as Appendix D, p. 32, Court of Appeals. Defendant states:

> "That the milk proposed to be marketed by the plaintiff is not produced or pasteurized under provisions equivalent to the requirements of the West Virginia

> Regulations, and will not be so produced and pasteurized in the future unless the Pennsylvania milk regulations are changed to conform to the provisions of West Virginia regulations in the following respects" . . . (p. 33)

Defendant then names eight points. But it has developed in the hearing that the first part of point number one, relating to inspection of dairy farms is the crux of the problem. We quote:

> "Inspection of dairy farms and milk plants shall be made by the health officer (a public official rather than an approved inspector employed by the applicant)." (p. 33)

Under Pennsylvania and Pittsburgh practice dairy farms are inspected by approved, qualified inspectors, licensed under laws of Pennsylvania, but who are paid by industry. App. J, p. 89, Court of Appeals. Processing plants are inspected only by employees of Health Department of Pittsburgh, the enforcing agency in this case, and samples of pasteurized milk are picked up by official agents of the department. Samples of raw milk from dairy farms are picked up by technicians of commercial laboratory in Pittsburgh, or personnel of Dairy Products Company of Uniontown. App. J, p. 92, Court of Appeals.

Darold W. Taylor made his second inspection in accordance with the order of the court, and filed a report May 11, 1954. Appendix F, p. 41, et seq., Court of Appeals. It covers thirty-seven producing dairy farms selected at random from the Dairy Products Company's total producer

farms. It gives a United States Public Health Service rating of raw milk sold to plants of 90.82 percent, and pasteurization plant and receiving station, 92.55 percent. Taylor chose the City of Pittsburgh Health Department as the enforcing agency, since it has supervision of Dairy Products Company's processing plant and receiving station, and the producer dairy farms tributary thereto, by reason of the fact that Dairy Products Company sells milk in the City of Pittsburgh, and has a permit from its health department to do so. Under item one, status of enforcement, he reported that,

> "After a review of records in Pittsburgh, Pennsylvania, and as a result of field work on the farms and in processing plant, it is felt that interpretations are being made substantially in conformity with the Public Health Service Milk Ordinance and Code." (p. 44)

In closing, he stated:

> "It is evident from the records available, and the interest shown on the part of the Pittsburgh City Health Department officials, that a satisfactory control program is being set up there. The system and approach to be used by Pittsburgh in carrying out adequate enforcement should satisfy the above requirements adequately." (p. 47)

The survey was made in accordance with sanitary standards required under West Virginia Milk Regulations adopted January 3, 1944. (p. 41)

Defendant rejected the new application by letter, on the stated ground that the supervision of the City of Pittsburgh

Health Department is not compulsory, therefore not in accordance with the most important view of the West Virginia requirements. Appendix G, p. 51, Court of Appeals.

In defendant's deposition he testified that his basis of refusal was that, "The enforcement methods which could be applied to the Dairy Products Company were not in accordance with those required by West Virginia Milk Regulations." Appendix I, p. 60, Court of Appeals; that he was satisfied with all points of criticism in Mr. Taylor's second report excepting number two, having to do with enforcement. Appendix I, p. 75, Court of Appeals. In other words, as found by the District Court, defendant's objections to the second Taylor report had all been eliminated except for the fact that under Pennsylvania and Pittsburgh regulations and practice, inspection of producer dairy farms, and the collection (and testing) of samples (of raw milk) were entrusted to inspectors in the employ of milk producers, Appendix K, p. 116, Court of Appeals; that the quality of the milk of Dairy Products Company was good was admitted by defendant,

> "Well, I would like to be quite clear that I have no question about the quality of the milk from the Dairy Products."
>
> Question by counsel: "It is good quality?"
>
> Answer: "Good quality." Appendix I, p. 80, Court of Appeals.

The case next came on for hearing before Judge Wilkin on September 23, 1954. On that date it was submitted on the pleadings, stipulations, deposition of Roger A. Kennedy, then Health Officer of Monongalia County, and the testi-

mony of Albert H. Brunwasser, Chief of the Milk and Food Division of the City of Pittsburgh Health Department taken before the trial judge September 23, 1954, and briefs.

The court gave its written opinion December 13, 1954, in which it stated:

> "All objections in the second Taylor report had been eliminated except number two. Kennedy was satisfied that the Pittsburgh regulations and enforcement methods generally were up to the standard of the United States Public Health Service and the West Virginia regulations except for the fact that under Pennsylvania and Pittsburgh regulations inspections of producer farms and the collection and testing[1] of samples were entrusted to inspectors in the employ of milk producers." Appendix K, p. 116, Court of Appeals.

The District Court on January 3, 1955 overruled defendant's motion to dismiss the amended complaint, and entered judgment on the merits for plaintiff, prefaced by the following statement:

> "Considered in the light of the aims and basis of West Virginia regulations, this court is constrained to find the enforcement regulations and methods of the Pittsburgh Health Department are equivalent to the regulations and methods of West Virginia, and further finds that the refusal of the Health Officer of Monon-

[1] The use of the words "and testing" here by the District Court is erroneous. Samples of raw milk are taken to Pittsburgh for analysis. Appendix J, p. 92, Court of Appeals.

galia County, West Virginia, to grant a permit to the plaintiff is an unwarranted obstruction to interstate commerce in milk and milk products, and is a violation of the plaintiff's constitutional rights." Appendix K, p. 122, Court of Appeals.

The court ordered that the defendant, Clark J. Sleeth, successor of Kennedy, within five days from the entry of the order of record issue a permit to the plaintiff, Dairy Products Company of Uniontown, to sell its milk and milk products in Monongalia County. Appendix L, p. 125, Court of Appeals.

Motion by defendant for reconsideration was filed January 5, 1955. An order was entered on January 11, 1955 suspending the judgment of the court pending a rehearing. Rehearing was held on April 18, 1955, at Wheeling, West Virginia. At this hearing Albert H. Brunwasser, Chief of the Milk and Food Division of City of Pittsburgh Health Department testified in the presence of the court, and produced the official records of inspection of dairy farms tributary to processing plant of plaintiff, which defendant had stated in his motion were not available at the offices of City of Pittsburgh Health Department. From the records so submitted and testimony of the witness, it appeared that fifty-two of said dairy farms, out of a variable number of two hundred fifty to three hundred, had been inspected by employees of City of Pittsburgh Health Department, as shown by reports of November 4, 1953 and February, 1954. Appendix O, p. 201, Court of Appeals. Witness also testified that he had additional reports that covered the period of June 1, 1953, not included in the total of fifty-two reports, Appendix O, p. 209, Court of Appeals; that the remainder of the producer dairy farms tributary to plaintiff's processing plant were inspected by dairy farm inspectors who had been qualified under the laws of Pennsylvania, and by training and practical experience in the field, and who were licensed by the state to do the work of inspection, and who were employees of and paid by industry, in this instance, Dairy Products Company, Appendix J, p. 89, Court of Appeals; that the City of Pittsburgh Milk Control Division checks and evaluates the dairy farm sanitation reports submitted by the milk industry under the supervision of the City of Pittsburgh, Appendix O, p. 235, Court of Appeals; that out of a possible two hundred fifty dairy farms he had official inspections of fifty-two farms, as shown by reports submitted over a period of thirteen months from November, 1953 to December, 1954, Appendix O, p. 238, Court of Appeals; that he would be able to give a percentage rating on all of the producer farms that are selling raw milk to Dairy Products Company, such as given by USPHS inspection, within a period of at least five days to the Health Officer of Monongalia County, Appendix O, p. 244, Court of Appeals.

At the conclusion of the hearing on the motion for reconsideration, the court entered an order overruling defendant's motion and setting aside the order of the court entered on January 11, 1955 suspending the operation of the court's judgment of January 3, 1955, and directing defendant, within ten days from the entry of the order, to issue a permit to plaintiff to sell its milk and milk products in Monongalia County. Appendix P, p. 263, Court of Appeals.

West Virginia Milk Regulations, adopted January 3, 1944, in accordance with Chapter 16, Article 7, Section 5 of Code of West Virginia, are almost identical with the

Milk Ordinance and Code recommended by the United States Public Health Service, 1939, and the revised edition of 1953. The revised edition of West Virginia regulations of September 16, 1954 follows very closely the earlier edition.

Pennsylvania has not adopted the Milk Ordinance and Code recommended by the United States Public Health Service. The production, processing and sale of milk products is regulated under an Act of the General Assembly designated No. 210, and by Advisory Health Board regulations pertaining to milk and milk products, adopted April 24, 1940, both of which appear in Appendix III herewith. The City of Pittsburgh, under authority of general legislation, is permitted to adopt more stringent requirements relating to milk and milk products than provided for in Act No. 210, and has, through its general health ordinances, granted to the health officer the authority to promulgate regulations, known as No. 500, under which the City of Pittsburgh Health Department operates under more stringent regulations than the basic legislation. Appendix J, p. 94, Court of Appeals.

Under Pennsylvania procedure the City of Pittsburgh Health Department requires that bacteriological analyses be submitted through an approved laboratory semi-monthly of the milk from dairy farms. In addition, milk companies under permit by the City of Pittsburgh are required to submit finished products to City of Pittsburgh Milk Laboratory for analyses; and in addition, City of Pittsburgh Health Department collects official samples by its own staff. Appendix J, pp. 88, 89, Court of Appeals.

On appeal by defendant, the Court of Appeals reversed.

The reasons assigned for the reversal appear on page seven of the opinion, Appendix II herewith. The Court of Appeals placed much emphasis upon the discretionary rights of the Health Officer of Monongalia County to grant or refuse a permit to plaintiff. It gave but cursory consideration to the right of plaintiff under the federal constitution to engage in interstate commerce.

The Court of Appeals disregarded the findings of fact by the District Court, and then stated that the evidence showed that only ten per cent of the Pennsylvania dairy farms and plants were inspected four times each year instead of all the farms and plants every six months, when in fact the testimony of witness Brunwasser shows that during the period September, 1953 to June, 1954 official employees of his department had inspected approximately sixty dairy farms out of a variable number of two hundred fifty to three hundred, which is considerably more than ten per cent. Appendix J, p. 88, Court of Appeals. Inspection of the remainder of the farms was required each six months period, or twice a year, by licensed, approved dairy farm inspectors. The reports of both official and licensed dairy farm inspectors are filed in the office of the City of Pittsburgh Milk Control Division, where they are checked and evaluated. Appendix J, pp. 89, 91, Court of Appeals.

The Court of Appeals then determined that it was well within the discretion of the Health Officer of Monongalia County to determine whether or not the Pittsburgh regulations were equivalent to those of West Virginia, and to decide whether the permit should be issued or refused.

Since the claim of defendant in his answer is that the milk of plaintiff would never be produced or pasteurized

under regulations equivalent to the requirements of the West Virginia regulations unless the Pennsylvania regulations are changed to conform to the provisions of the West Virginia regulations, it becomes apparent that Pennsylvania and Pittsburgh regulations must be identical to those of West Virginia, although Section 11 of the West Virginia Milk Regulations says equivalent, and the revised regulations, substantially equivalent.

It is therefore apparent that the Court of Appeals, in addition to disregarding the fact finding of the District Court, has incorrectly evaluated the evidence, and has misconceived the law applicable thereto.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed for the following reasons:

1. It erroneously interprets the West Virginia Milk Regulations adopted January 3, 1944, as amended September 16, 1954, especially Section 11, Milk and Milk Products From Points Beyond the Limits of Routine Inspection.

The decision, as we interpret it, is that milk from points beyond routine inspection may not be sold in West Virginia unless produced under provisions identical to West Virginia regulations. That is also the method of enforcement of the Health Officer of Monongalia County. In his answer to the amended complaint he says that the milk of plaintiff is not produced under provisions equivalent to the requirements of West Virginia regulations, and will not be so produced in the future unless Pennsylvania regulations are changed to conform to provisions of West Vir-

ginia regulations, so that inspection of dairy farms shall be made by the health officer, a public official, rather than an approved inspector employed by industry. Appendix D, p. 33, Court of Appeals. But Section 11 of [redacted]mended regulations says, not "identical", but "substantially equivalent".

The West Virginia Milk Regulations are patterned after and are practically identical to the Milk Ordinance and Code recommended by the United Public Health Service of 1939. The 1953 edition of the Milk Ordinance and Code contains some revisions, especially of Section 11. This revised section appears in Appendix III to this petition. West Virginia Regulations are statewide in application, but are enforced on a county-unit basis by a county officer. The revised regulations of September 16, 1954, Section 15, provide for enforcement in accordance with the interpretations in Milk Ordinance and Code, 1953 Recommendations of the Public Health Service.

The Health Officer of Monongalia County, who is a county, not a state, officer, finds it practicable to have inspection of dairy farms under his supervision in Monongalia County made by employees of his department, sometimes referred to as "official agents". He has under his jurisdiction seventy-five farms and two processing plants; one inspector does the work. He tries to project this method of dairy farm inspection across the state line into Pennsylvania. The enforcing agency in Pennsylvania, City of Pittsburgh Health Department in this case, has under its jurisdiction and supervision thirty-six processing plants and ten thousand dairy farms. Pennsylvania has adopted a different method of dairy farm inspection under its basic law and regulations. Dairy farms are inspected in part by em-

ployees, or official agents, of the enforcing agency, in this case City of Pittsburgh Health Department, and in part by dairy farm inspectors, qualified and licensed by Pennsylvania, formerly through its Department of Health, but now its Department of Agriculture, who are employees of industry, in this instance Dairy Products Company. These inspectors are required to answer written examination, subjective in nature, and are taken into the field and required to perform in accordance with the requirements of the basic law and regulations; their work is evaluated by the enforcing agency. Appendix J, pp. 91, 98, Court of Appeals.

The City of Pittsburgh Health Department operates under the basic law of the state, and Ordinance No. 500 adopted by the City of Pittsburgh, giving the health department authority to adopt regulations for the production and sale of milk. Regulations have been adopted in pursuance thereof which are more stringent than the basic legislation of Pennsylvania. The health department operates under these regulations. They meet the minimum requirements of the Milk Ordinance and Code USPHS, and in some instances are more stringent. Appendix J, p. 94, and Appendix O, pp. 186 to 192, Court of Appeals.

Darold W. Taylor, in his second survey, Appendix F, p. 44, Court of Appeals, "Status of Enforcement", states that,

> "After a review of records in Pittsburgh, Pennsylvania, and as a result of field work on farms and in processing plants, it is felt that the interpretations are being made substantially in conformance with the Public Health Service Milk Ordinance and Code."

Mr. Taylor is Senior Sanitarian, USPHS Region III,

Washington, D.C. The District Court after hearing all of the evidence, found that the enforcement regulations employed by the City of Pittsburgh Health Department are equivalent to the regulations and methods of West Virginia.

The Health Officer of Monongalia County would not accept the method of dairy farm inspection adopted by Pennsylvania and City of Pittsburgh Health Department. He required that such inspection be identical to that used by him in Monongalia County. The Court of Appeals has adopted his view. It follows that petitioner can never qualify for a permit to sell milk in Monongalia County until Pennsylvania has changed its law, regulations and practice to conform to that followed in Monongalia County. Therefore, the petitioner, having no control over Pennsylvania laws, regulations and practices, may be permanently deprived of its right to engage in interstate commerce under the federal constitution, though its product is considered by the defendant to be of good quality.

City of Pittsburgh Health Department was treated as the enforcing agency by Darold W. Taylor in his survey, because Dairy Products Company has a permit to sell milk in Pittsburgh, and sells large quantities there. Its regulations and procedures are more stringent and its laboratory facilities more adequate than those of Pennsylvania.

The problems of dairy farm inspection as between Monongalia County and Pennsylvania and the City of Pittsburgh are not comparable because of the great difference in the number of units under the respective authorities. Viewed from a state-wide standpoint, the problem in Pennsylvania is greatly magnified, and the financial burden greatly increased.

There is no inhibition in West Virginia Milk Regulations against inspection of dairy farms by qualified and licensed inspectors who are paid by industry. The West Virginia method of inspection has been adopted by the Health Officer outside of the regulations. Whatever he may do in applying his interpretation to dairy farm inspection in West Virginia, we question his right to apply it to Pennsylvania producers in a way to exclude absolutely their product from interstate commerce. That would be the kind of discrimination the court said could not be done in *Dean* vs. *Madison*, 340 U. S. 349.

It is alleged in the complaint that it is the purpose of the Health Officer of Monongalia County so to enforce the milk regulations as to exclude Pennsylvania dairy products from Monongalia County to protect local milk producers and processors from competition. However, this question was not gone into by the trial court because of the procedure followed there to work out a solution of the problem through inspection by a representative of USPHS and avoid extensive taking of testimony.

We refer to the following parts of West Virginia Milk Regulations, 1944, having bearing on the questions raised herein:

Section 1, Sub-section R—Health Officer.

Section 3—Permits.

Section 5—Inspection of Dairy Farms and Milk Plants.

Section 6—The Examination of Milk and Milk Products.

Section 11—Milk and Milk Products from Points Beyond the Limits of Routine Inspection.

Section 15—Enforcement Interpretation.

Pertinent parts of West Virginia Milk Regulations of January 3, 1944, with reference to certain amendments of September 16, 1954, appear in Appendix III herewith.

No question of the constitutionality of the West Virginia Milk Regulations is raised in this case; rather the issue is whether the Health Officer of Monongalia County is not enforcing the regulations in an illegal and unconstitutional manner. In the case of *Minor* v. *The City of Keokuk*, 92 Fed. Sup. 833, the court stated that it could not give approval to the exercise of police power which would operate absolutely to exclude milk distributors' products from interstate commerce. In the case of *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, the court said,

> "A valid law may be wrongly administered by officers of a city, and so as to make such administration an illegal burden or exaction upon the individual."

In *Cummings* vs. *Merchants National Bank of Toledo*, 101 U. S. 903, it is stated that the doings of the parties acting under a statute "may be unlawful, while the statute is valid".

There is no question of the quality of the milk produced and offered for sale by Dairy Products Company. The former Health Officer, Roger A. Kennedy, testified that the milk of Dairy Products Company was of good quality. Appendix I, p. 80, Court of Appeals.

This court, in the case of *Dean Milk Company* vs. *Madison, Supra,* pointed the way to a solution of the problem of inspecting milk supplies in an area remote from the place of consumption:

> "The receiving city may determine the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings of specific plants or of the milk shed in the distant jurisdiction through the United States Public Health Service, which routinely and on request spot-checks the local ratings."

That was done in this case. The court further said in that case:

> "To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that 'one state in its dealings with another may not place itself in a position of economic isolation'." *Baldwin* v. *G.A.F. Seelig, Inc., supra,* 294 U.S. at page 527, 55 S. Ct. at page 502.

Section 11 of the Milk Ordinance and Code, USPHS 1953, offers other solutions of the problem. This section appears in Appendix III herewith. Under this revised section it is recommended that the health officer approve without inspection, subject to laboratory tests upon arrival,

milk products from any area or shipper not under his routine inspection (1) when they are produced and processed under regulations substantially equivalent to those of this ordinance, (2) when they are under routine official supervision, (3) when they have been awarded by the milk sanitation authority of the state of origin a rating equal to that of the local supply, or if lower than local supply, equal to ninety per cent or more. The rating given by Darold W. Taylor in his second report is more than ninety per cent.

2. The decision in this case should be reviewed because it is in conflict with the principles laid down by this court in *Dean Milk Company* v. *City of Madison* (1951), 340 U. S. 349; *Baldwin* v. *Seelig, Inc.,* (1935), 294 U. S. 511; *H. P. Hood and Sons, Inc.* v. *Dumond, etc.,* (1949) 336 U. S. 525.

3. The Court of Appeals appears to have disregarded the findings of fact by the District Court, which, unless clearly wrong, and the court did not so find, is contrary to Rule 52(a). Appendix III herewith.

In *U. S.* v. *Yellow Cab Co.,* (1949) 338 U. S. 338, the court held that,

> "While, of course, it would be our duty to correct clear error found in findings of fact, the government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way, but where the trial court has decided it to weigh more heavily for the defendant, such choice between two permissible views of the weight of evidence is not clearly erroneous."

In *Graver Tank & Mfg. Co.*, v. *Linde Air Products Co.*, (1950), 339 U. S. 605, this court held that,

> "A finding of equivalence is determination of fact. Proof can be made in any form through testimony of experts or others versed in the technology . . . Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court, and the court's decision under general principle of appellate review should not be disturbed unless clearly erroneous. . . ."

In this case the District Court found that the enforcement regulations and methods of the Pittsburgh Health Department were equivalent to regulations and methods of West Virginia. This under the above case would be a finding of fact on that question. Appendix K, p. 122, Court of Appeals. This was based on undisputed evidence and the report of Darold W. Taylor The defendant offered no evidence, except on his motion for reconsideration. The evidence presented there availed nothing as against official records produced by plaintiff.

On this question we cite these additional cases:

Cleo Syrup Corp., v. *Coca Cola Co.*, (1943) 139 Fed. 2d, 416.

Nee v. *Linwood Securities Co.*, (1949) 174 Fed. 2d. 434.

The questions presented by this case are of great and recurring significance, touching as they do the right of

plaintiff to engage in interstate commerce under the federal constitution. From the great number of cases we have found on this subject, many of them relate to the dairy business and traffic in milk from one state to another. Such traffic is advantageous to producer and consumer. Some areas have an excess in production of milk beyond local needs, and others a deficit. In this case, West Virginia has a deficit. We recognize the right of the receiving community to protect its citizens by reasonable laws and regulations to insure that the imported milk is of good quality, clean and wholesome. We observe, however, that many municipal and state regulations go far afield from that aim, both in form and method of enforcement, actuated, no doubt, by local interests and prejudices. The fundamental principle of freedom of commerce between states, protected by the federal constitution, which has contributed so much to the growth and strength of our country, should not be lost sight of or ignored.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GLENN HUNTER
CHARLES MCCAMIC
Attorneys for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7039.

Clark K. Sleeth, as Health Officer of Monongalia County, West Virginia,
Appellant,

versus

Dairy Products Company of Uniontown,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING.

(Argued November 15, 1955. Decided December 27, 1955.)

Before PARKER, Chief Judge, SOPER, Circuit Judge, and R. DORSEY WATKINS, District Judge.

George R. Farmer (Cletus B. Hanley, Assistant Attorney General of West Virginia, and Albert M. Morgan, Prosecuting Attorney, Monongalia County, West Virginia, on brief) for Appellant, and Glenn Hunter (Charles McCamic on brief) for Appellee.

SOPER, Circuit Judge:

This suit was brought in the District Court by Dairy Products Company of Uniontown, a Pennsylvania corporation, against Roger A. Kennedy, Health Officer of Monongalia County, West Virginia,* to secure a judgment commanding the Health Officer to approve an application of the company for a permit to distribute milk in the county and forthwith to issue the permit. There was also a prayer for an injunction to restrain the Health Officer from prosecuting the company, criminally or otherwise, for selling milk in the county without a permit and from arresting its agents because of any such sale; but the suit was not pressed on the latter ground. Jurisdiction is based on the ground that the action was of a civil nature between citizens of different states wherein the controversy exceeds the sum of $3,000, and the purpose of the suit is to restrain the defendants from interfering with the company in carrying on its lawful business in Monongalia County in the course of interstate commerce.

The principal question at issue is whether the Dairy Products Company had conformed to milk regulations is-

---

* Clark K. Sleeth, having succeeded to the office before the conclusion of the case, was substituted as party defendant.

sued by the Public Health Council of the State of West Virginia on January 5, 1944, under the power conferred by Ch. 16, Art. 7, §5 of the Code of West Virginia. It was alleged in the complaint that the Dairy Products Company had complied with the laws and regulations of the State of Pennsylvania regarding the distribution of milk and also with the milk regulations of the City of Pittsburgh which are more stringent than those of the State, and that these laws and regulations were equivalent to the regulations of the State of West Virginia; and that the Company had applied to the Health Officer of Monongalia County for a permit to sell milk in the county, but that he had arbitrarily and unreasonably refused to issue it. The suit was defended on the ground that the Pennsylvania and Pittsburgh regulations were not equivalent to the regulations of West Virginia and therefore the Dairy Products Company was not entitled to the permit. The District Judge found that there was equivalency and therefore held that the refusal of the Health Officer of the county to grant a permit to the county was an unwarranted obstruction to interstate commerce in milk and milk products, and violated the plaintiff's constitutional rights.

The validity of Ch. 16, Art. 7, §5 of the West Virginia Code, which directs the Public Health Council to adopt regulations to provide clean and safe milk and milk products to be enforced by local health authorities throughout the state, is not questioned. Nor is the validity of the regulations themselves challenged. In *Dean Milk Co. v. Madison*, 340 U.S. 349, the Supreme Court of the United States recognized the appropriateness of the local regulation of the sale of milk as within the powers of the states, even though interstate commerce may be affected, in the absence of fed-

eral legislation; and in *State* v. *Bunner*, 126 W. Va. 280, the Supreme Court of West Virginia held that the West Virginia statute did not involve an unconstitutional delegation of legislative authority and that the regulation forbidding the sale of milk without a permit from the county Health Officer was valid, although no statute expressly authorized the Counsel to make the permit a prerequisite of sale. The court also held that the regulation providing that only persons complying with the regulations should be entitled to a permit did not confer on the Health Officer arbitrary power or discretion to grant or refuse a permit; and the court added that if it should be that any regulation was unreasonable or invalid, the applicant should not be required to comply therewith; but the method of procedure in such case was to apply to a proper court to compel the issuance of the permit, rather than to operate in defiance of the regulations.

The regulations issued under the authority of the statute are sweeping in scope and elaborate in detail. Amongst other things, it is provided in §5 that at least once during each grading period, in no case to exceed six months, the Health Officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the State of West Virginia. Section 6 provides for the taking and examination by the Health Officer of at least four samples of the product from each dairy farm and milk plant during each grading period. Section 7 provides for the announcement every six months by the Health Officer of the grades of milk and milk products to be delivered by producers and distributors; and the standards for the grading of the milk, the conditions under which it is produced and handled, and the pasteurization of the product are meticulously prescribed. Section 11 of the regu-

lations with which we are particularly concerned, provides milk and milk products from points beyond the limits of routine inspection of the state may not be sold therein, unless produced and pasteurized under provisions equivalent to the requirements of the West Virginia regulations, provided that the Health Officer shall satisfy himself that the Health Officer having jurisdiction over the production and processing is properly enforcing such provisions. Penalties are provided by §16 for violations of the regulations.

It is manifest that the duty imposed upon the county Health Officer of West Virginia by the statutory regulations involves the construction and application thereof, and the exercise of judgment and discretion in their enforcement. His duties are not so plainly marked as to amount to a positive command, and hence the well established rule applies that the courts will not issue a mandamus or other order to control the action of an executive or administrative officer in the discharge of statutory duties involving the exercise of judgment or discretion, unless the attempted performance of the duty amounts to an abuse of discretion.

Mandamus will lie where there is a clear legal right to the performance of a particular act or duty at the hands of the respondent, and such act or duty is of a ministerial nature[1] rather than one involving the exercise of discretion.[2] It will lie to compel officers with discretionary duties

---

[1] *Kendall* v. *United States ex rel Stokes*, 12 Pet. 522.

[2] *Decatur* v. *Paulding*, 14 Pet. 497, 516; *Keim* v. *United States*, 177 U. S. 290, 292; *State* v. *Pocahontas County Court*, 92 W. Va. 222; *Swearingen* v. *Bond*, 96 W. Va. 193; *Peoples ex rel Sheppard* v. *Illinois State Board of Dental Examiners*, 110 Ill. 180.

to take action,[3] but it will not interfere with the exercise of their discretion unless their action is illegal,[4] or is an arbitrary or capricious abuse of such discretion.[5] This remedy is available only when all administrative remedies have been, exhausted,[6] and when there is no other available remedy.[7]

The evidence in this case in our opinion does not disclose such an abuse of discretion as to warrant the intervention of the court. The proceedings in the District Court extended over a considerable period of time, during which careful investigations were made in order to ascertain whether the company's milk complied with the West Virginia requirements. The West Virginia regulations conform with the model milk ordinance and code recommended by the United States Public Health Service; and so the parties to the case agreed to designate Darold W. Taylor of the United States Public Health Service to inspect the farms supplying milk to the company and to examine its receiving and pasteurization plants and laboratory facilities and procedures, and to report his findings to the court to be received in evidence for all proper purposes. This inspection was made and the report was filed in January, 1953. When the case came to trial on November 6 of that year and the Taylor report was submitted, it was found that the West

---

[3] *Edgerton* v. *Kingsland*, D. C. 168 F.2d 121; *Paramount Pictures* v. *Rodney*, 3 Cir., 186 F.2d 111.

[4] *Proctor & Gamble Co.* v. *Coe*, D.C., 96 F.2d 518; *State ex rel Kelly* v. *City of Grafton*, 87 W. Va. 191.

[5] *Bates & Guild Co.* v. *Payne*, 194 U.S. 106, 108-9; *State* v. *Clendenin*, 92 W. Va. 618; *Illinois State Board of Dental Examiners* v. *People ex rel Cooper*, 123 Ill. 227.

[6] *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 123.

[7] *Marbury* v. *Madison*, 1 Cr. 137, 169.

Virginia requirements had not been met. Thereupon the plaintiff was permitted to file an amended complaint and Mr. Taylor was designated to make another inspection. His second report was filed May 11, 1954 but the permit was again withheld because the Health Officer of the county was still of the opinion that the enforcement methods of the State of Pennsylvania and of the Pittsburgh Health Department were not equivalent to those of the State of West Virginia.

The case came to hearing under these circumstances. It was shown that some of the objections previously urged by the Health Officer had been met, but that in certain respects the Pittsburgh regulations were not as strictly enforced as those of the State of West Virginia. Two circumstances only need to be referred to in this connection. Section 5 of the regulations, as we have seen, requires that the West Virginia Health Officer shall inspect all dairy farms and all milk plants whose products are intended for consumption within the state at least once during each six months. It will be perceived that this requirement involves an inspection of *all* of the farms and plants and that the inspection be made by the Health Officer of the state. These two requirements were not met by the Pennsylvania or Pittsburgh methods of enforcement. The evidence showed that only about 10% of the Pennsylvania farms and plants were inspected four times each year instead of all of the farms and plants every six months, and also that the inspection was made by employees of the producer or shipper of milk who were authorized to make the inspection by the state officials but were on the payroll of the employer or shipper. It is clear that both of these circumstances relate to important features of the inspection of the product and the enforcement of the regulations, and that it was well